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No. 96-1346

In the Supreme Court of the United States

OCTOBER TERM, 1996

DANIEL M. PARADIES, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTIONS PRESENTED

1. Whether 18 U.S.C. 1346, which defines a "scheme to defraud" to include a scheme to deprive another of the intangible right to honest services, makes the mail fraud statute applicable to schemes to defraud citizens of the right to public officials' honest services.

2. Whether taped evidence of a witness's payoffs to public officials, including statements of the witness on the tapes, was inadmissible hearsay.

3. Whether 18 U.S.C. 666, which prohibits corrupt payments to officials of state and local agencies that receive federal funds, requires proof that the payments affected the disbursement or integrity of the federal funds.

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OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-48a) is reported at 98 F.3d 1266.

JURISDICTION

The judgment of the court of appeals was entered on September 23, 1996. A petition for rehearing was denied on December 26, 1996. Pet. App. 49a-50a. The petition for a writ of certiorari was filed on February 21, 1997. A motion to amend the petition for a writ of certiorari and to add a question presented was filed on February 28, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Northern District of Georgia, petitioners were convicted on 83 counts of mail fraud, in violation of 18 U.S.C. 1341. In addition, petitioner Daniel Paradies was convicted on one count of conspiracy to violate 18 U.S.C. 666 through the making of corrupt payments to public officials, in violation of 18 U.S.C. 371.[1] Petitioner Daniel Paradies was sentenced to 33 months' imprisonment and fined $7,500. Petitioner Paradies Shops, Inc., was sentenced to five years' probation and fined $1,500,000. Petitioner Paradies Midfield was sentenced to five years' probation. The court of appeals affirmed. Pet. App. 1a-48a.

1. Daniel Paradies was president and principal shareholder of The Paradies Shops, Inc., a major gift shop chain at airports across the country. He was also president of Paradies Midfield Corporation, a company that contracted to operate the gift shop at the Atlanta Hartsfield International Airport, which is owned and operated by the City of Atlanta. Ira Jackson was a member of the City Council of Atlanta who owned a hidden interest in Paradies Midfield Corporation. Petitioners' convictions arose from their involvement in two fraudulent schemes concerning the operation of various concessions at the Atlanta airport. Pet. App. 3a, 7a-10a.

In the first scheme, petitioners and Jackson conspired to profit from Jackson's influence as an Atlanta City Councilmember and as the Commissioner of

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[1] Co-defendant Ira Jackson was convicted of mail fraud, receiving corrupt payments (18 U.S.C. 666), and subscribing to false income tax returns (26 U.S.C. 7206(1)). Co-defendant Mack Wilbourn was acquitted of all counts against him.

Aviation. Petitioners assisted Jackson in purchasing an ownership interest in Paradies Midfield Corporation, and in concealing Jackson's ownership interest from the City. Thereafter, petitioners paid Jackson more than $1 million, disguised as fees and dividends, in return for Jackson's use of his political position to reduce the rent of the concessionaires at the Atlanta airport. Pet. App. 1a-12a.

In the second scheme, Daniel Paradies and Harold Echols, another airport concessionaire, regularly gave cash to Jackson and other City Councilmembers for favorable votes in matters before the Council in which petitioners and other concession operators had an interest. Pet. App. 4a, 12a-13a. After Echols began cooperating with the government, the government videotaped and audiotaped breakfast meetings held between Echols and two other City Councilmembers, Marvin Arrington and Buddy Fowlkes. The tapes showed the Councilmembers accepting bribes. They also contained statements by Echols to the Councilmembers that Daniel Paradies had decided not to testify before the grand jury. *Id.* at 42a; Gov't C.A. Br. 125.

2. Before trial, Paradies filed a motion in limine to exclude the tapes of Echols' breakfast meetings on the ground that they were hearsay and were irrelevant and prejudicial. The district court disallowed the tapes in the government's case-in-chief, but reserved final determination on the matter because, it reasoned, the tapes might be admissible to rehabilitate Echols' credibility. Pet. App. 42a-43a.

At trial, Echols testified that he and Paradies entered into an agreement whereby Echols would pay off certain City Councilmembers, including Arrington and Fowlkes, to ensure that they exercised their

authority to favor the airport concessionaires. Under the agreement, Paradies would reimburse Echols for a portion of those payments. Gov't C.A. Br. 124. Echols testified that he had regular, weekly breakfast meetings with Fowlkes and less frequent breakfast meetings with Arrington, at the close of which meetings Echols paid bribes to Fowlkes and Arrington by slipping money into their coat pockets. Gov't C.A. Br. 124-125.

During cross-examination of Echols, defense counsel attempted to discredit Echols's direct testimony. Pet. App. 43a; Gov't C.A. Br. 125. On redirect testimony, the government again sought to introduce the tapes. The district court admitted the tapes under Federal Rule of Evidence 801(d)(1)(B), permitting admission of certain prior consistent statements of a witness, to corroborate Echols' testimony: "The reason I admitted this testimony was to sustain him, if it does, with respect to the thorough and sifting cross-examination seeking to completely impeach everything this witness said, and that is why I let it in. * * * That was almost by invitation on the part of Mr. Paradies' counsel." Pet. App. 43a; Tr. 2232; Gov't C.A. Br. 125.

3. The court of appeals affirmed petitioners' convictions. Pet. App. 1a-48a. The court rejected petitioners' contention that the application of the mail fraud statute, 18 U.S.C. 1341, in a prosecution that invokes the definition of a "scheme to defraud" in 18 U.S.C. 1346 to include "a scheme or artifice to deprive another of the intangible right to honest services," is unconstitutionally vague (Pet. App. 26a-29a), or required a showing in this case that petitioners had a duty to the victims independent of the mail fraud statute itself (*id.* at 24a-26a). The court observed in a

footnote that, after this Court held in *McNally* v. *United States*, 483 U.S. 350 (1987), that the mail fraud statute did not prohibit schemes to deprive the public of the honest services of public officials, Congress enacted Section 1346 to "reinstate the *pre-McNally* rule that such schemes are prohibited by the mail fraud statute." Pet. App. 27a-28a n.30.

The court also rejected petitioner Paradies' claim that, because the payoffs to the Atlanta City Councilmembers did not affect federal funds, those bribes were not covered under 18 U.S.C. 666, and therefore he could not have been guilty of conspiring to violate that provision. Pet. App. 37a-39a. The court held that, although Section 666 applies only to payments made to officials of agencies receiving federal funds, the government is not required under Section 666 to trace the flow of federal funds and assistance to any particular project; it is sufficient that the government show that the agency received the minimum amount of federal assistance specified in the statute. Pet. App. 39a.

The court also rejected petitioners' claim that the district court improperly admitted the tapes of Echols' breakfast meetings with Councilmembers Arrington and Fowlkes. The court concluded that, under this Court's intervening decision in *Tome* v. *United States*, 513 U.S. 150 (1995), the tapes were not admissible under Rule 801(d)(1)(B) as substantive evidence because they were made after Echols agreed to cooperate with the government, and therefore were made after Echols' motive to fabricate arose. Nonetheless, the court upheld the admission of the tapes on the basis that Echols' statements on the tapes were not admitted for the truth of the matters asserted in those statements, and therefore were not hearsay at

all. Pet. App. 43a. The court noted that the breakfast conversations "were innocuous, and they were offered merely to rehabilitate Echols' testimony that the people involved had a familiar relationship and had regular breakfast meetings." *Id.* at 43a-44a. The court also found that there were no nonverbal hearsay concerns with the videotape because "[w]hen nonverbal conduct, like the transfer of money, is ambiguous, contemporaneous words which characterize the transactions are not hearsay." *Id.* at 44a.

DISCUSSION

1. Petitioners contend (Pet. 6-15) that, notwithstanding the enactment of 18 U.S.C. 1346, the mail fraud statute, 18 U.S.C. 1341, does not cover schemes to deprive citizens of honest services by public officials. The court of appeals correctly held to the contrary.

The mail fraud statute, 18 U.S.C. 1341, proscribes mailings in furtherance of "any scheme or artifice to defraud." Before 1987, every court of appeals that had addressed the issue had held that the mail and wire fraud statutes reached public corruption schemes intended to deprive citizens of their intangible right to honest services by public officials, even in the absence of a direct financial effect on a governmental entity. See Pet. App. 27a n.30. In *McNally* v. *United States*, 483 U.S. 350 (1987), this Court held that the mail fraud statute was "limited in scope to the protection of property rights," and it reversed the mail fraud convictions in that case, which had been premised on the theory that the defendants, as public officials, had engaged in a scheme to deprive the citizens of Kentucky of their intangible right to honest government. See *id.* at 360. The Court

explained that "there was no charge and the jury was not required to find that the Commonwealth itself was defrauded of any money or property." *Ibid.* See also *Carpenter* v. *United States*, 484 U.S. 19, 25 (1987) ("We held in *McNally* that the mail fraud statute does not reach 'schemes to defraud citizens of their intangible rights to honest and impartial government,' and that the statute is 'limited in scope to the protection of property rights.' ") (internal citation omitted).

The following year, in response to *McNally*, Congress enacted 18 U.S.C. 1346, which amended the federal fraud statutes (including the mail fraud statute) to provide that a " 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, Tit. VII, § 7603, 102 Stat. 4508. The legislative history makes clear that, in enacting Section 1346, Congress intended to overturn the result in *McNally* and expand the coverage of the mail and wire fraud statutes to reach schemes seeking to deprive citizens of their intangible right to honest services by public officials. As Representative Conyers explained immediately before its passage:

> The Subcommittee on Criminal Justice, which I chair, held a hearing on the McNally decision on May 12, 1988. At that hearing, John C. Keeney, Acting Assistant Attorney General for the Criminal Division, U.S. Department of Justice, testified that as a result of the McNally decision and many significant prosecutions of political corruption brought under the mail and wire fraud statutes have been dismissed or overturned on appeal.
> * * *

Prior to the McNally decision, every Federal appellate court that had considered the scope of the mail and wire fraud provisions held that those provisions protect the right of the public to the honest services of public officials and others responsible for the conduct of public or public affairs [sic]; the right of a member of an organization to the honest services of the leaders of that organization; and the right of employers to the honest service of their employees.

This amendment restores the mail fraud provision to where that provision was before the McNally decision. The amendment also applies to the wire fraud provision, and precludes the McNally result with regard to that provision.

The amendment adds a new section * * * that defines the term "scheme or artifice to defraud" to include a scheme or artifice to defraud another of "the intangible right of honest services." Thus, it is no longer necessary to determine whether or not the scheme or artifice to defraud involved money or property. This amendment is intended merely to overturn the McNally decision. No other change in the law is intended.

Some questions were raised during the Criminal Justice Subcommittee's hearing on the McNally decision regarding the Federal Government's constitutional role in prosecuting State and local corruption. I believe that the guarantee clause of the U.S. Constitution, article IV, section 4 can be used as a constitutional basis for Congress to pass criminal legislation relating to corruption in local government.

134 Cong. Rec. 33,296-33,297 (1988) (citations omitted). That passage makes clear that Congress intended Section 1346 to reach schemes to deprive citizens of their right to the honest services of public officials.[2]

Petitioners nonetheless argue (Pet. 12-15) that, because Section 1346 makes no express reference to state or local government or to state or local officials, the statute failed to expand the coverage of the mail fraud state to schemes to deprive citizens of their intangible rights of honest services, and thus failed to overturn the legal rule adopted by this Court in *McNally*. Nothing in the background or the legislative history of Section 1346, however, reflects any congressional desire to distinguish between the public's right of honest services from public officials and a private person's right to honest services from persons acting in a private capacity. To the contrary, given Congress's clear intent to overturn the result in *McNally* itself, which involved a public official's scheme to defraud the citizenry of its right to honest services, the conclusion is inescapable that Congress

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[2] A month after passage of Section 1346, a Senate Judiciary Committee Report similarly described the purpose of Section 1346 as follows:

> This section overturns the decision in *McNally* v. *United States* in which the Supreme Court held that the mail and wire fraud statutes protect property but not intangible rights. Under the amendment, those statutes will protect any person's intangible right to the honest services of another, including the right of the public to the honest services of public officials. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change.

134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988).

intended Section 1346 to reach schemes by public officials to deprive the public of honest services.

Petitioners note (Pet. 11-12 & n.5) that other bills before Congress around the same time that Section 1346 was passed expressly prohibited public corruption. That alternative bills to Section 1346 contained express language proscribing public corruption does not establish that the legislation ultimately passed did not reach such conduct. See *United States* v. *Frega*, 933 F. Supp. 1536, 1545 (S.D. Cal. 1996) (alternative bills are "unpersuasive evidence on the issue of whether Congress intended to extend mail fraud to public officials"; it is equally plausible that Congress did not pass the alternative bills because Section 1346 encompassed them and made them unnecessary). Congress may also have found the alternative proposed legislation too narrow in that it may have reached only corruption involving public officials, and not schemes to deprive private employers or organizations of their right to honest services by their officials and agents. Cf., *e.g.*, 134 Cong. Rec. 31,071-31,073 (1988) (text of alternative legislation, dealing with public corruption).

The courts of appeals that have definitively addressed the issue thus far have all concluded that Section 1346 reaches public corruption schemes. *United States* v. *Grandmaison*, 77 F.3d 555, 566 (1st Cir. 1996); *United States* v. *Catalfo*, 64 F.3d 1070, 1077 n.5 (7th Cir. 1995), cert. denied, 116 S. Ct. 1683 (1996); *United States* v. *Bryan*, 58 F.3d 933, 940 n.1 (4th Cir. 1995); *United States* v. *Waymer*, 55 F.3d 564, 568 n.3 (11th Cir. 1995), cert. denied, 116 S. Ct. 1350 (1996); *United States* v. *DeFries*, 43 F.3d 707, 709 n.1 (D.C. Cir. 1995); *United States* v. *Thomas*, 32 F.3d 418, 419 (9th Cir. 1994); *United States* v. *Holley*, 23 F.3d 902,

910 (5th Cir.), cert. denied, 513 U.S. 1043 (1994); *United States* v. *Dischner*, 974 F.2d 1502, 1518 n.16 (9th Cir. 1992), cert. denied, 507 U.S. 923 (1993); *United States* v. *Ames Sintering Co.*, 927 F.2d 232, 235 (6th Cir. 1990); *United States* v. *Alkens*, 925 F.2d 541, 548 (2d Cir. 1991); *United States* v. *Granberry*, 908 F.2d 278, 281 n.1 (8th Cir. 1990), cert. denied, 500 U.S. 921 (1991); *United States* v. *Martinez*, 905 F.2d 709, 715 (3d Cir.), cert. denied, 498 U.S. 1017 (1990). See also *West Virginia Univ. Hosp., Inc.* v. *Casey*, 499 U.S. 83, 114 (1991) (Stevens, J., dissenting) ("[The Court's] refusal to accept the widely held view by lower courts about the scope of fraud, see *McNally* * * *, was quickly corrected by the 100th Congress" through enactment of Section 1346). In *United States* v. *Brumley*, 79 F.3d 1430 (1996), a panel of the Fifth Circuit held that Section 1346 does not reach a scheme by public officials to deprive citizens of their right to honest services. That court, however, has granted the government's petition to rehear the *Brumley* case en banc. 91 F.3d 676 (1996). Accordingly, there is no pending conflict among the circuits on the application of Section 1346 to public officials.

2. Petitioners also contend (Pet. 17-26) that the court of appeals improperly upheld the admission of tapes of Echols' breakfast meetings with Arrington and Fowlkes. According to petitioners, Echols' prior consistent statements, recorded in the tapes, were inadmissible, either as substantive evidence pursuant to Federal Rule of Evidence 801(d)(1)(B) or for purposes of rehabilitation, because the statements were made after Echols had acquired a motive to fabricate. That argument misconstrues the basis for the court of appeals' decision upholding the admission of the tapes.

The district court admitted the videotapes of the meetings pursuant to Rule 801(d)(1)(B), which provides that a prior out-of-court statement consistent with a witness's trial testimony is not hearsay and is admissible for the truth of the matter asserted if the declarant testifies and is subject to cross-examination concerning the statement at trial, and if the prior statement is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.[3] The admission of the tapes under that theory was in accordance with prevailing law in the circuit at the time of trial. See *United States* v. *Farmer*, 923 F.2d 1557, 1568 (11th Cir. 1991). Following trial, however, this Court held in *Tome* v. *United States*, 513 U.S. 150 (1995), that Rule 801(d)(1)(B) "permits the introduction of a declarant's consistent out-of-court statements to rebut a charge of recent fabrication or improper influence or motive only when those statements were made before the charged recent fabrication or improper influence or motive." 513 U.S. at 167. Here, because Echols' prior statements were made after he began cooperating with the government, and thus after he acquired a motive to fabricate, the tapes were not admissible as substantive evidence pursuant to Rule 801(d)(1)(B).

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[3] Rule 801(d)(1)(B) provides that a statement is not hearsay if

> [t]he declarant testifies at the trial or hearing and is subject to cross-examination concerning the statement, and the statement is * * * consistent with the declarant's testimony and is offered to rebut an express or implied charge against the declarant of recent fabrication or improper influence or motive.

The court of appeals did not uphold the admission of the tapes under Rule 801(d)(1)(B). Rather, the court of appeals upheld the admission of the tapes on the ground that they did not constitute hearsay at all because the statements on the tape were not offered for the truth of the matters asserted in the statements.[4] See Fed. R. Evid. 801(c) ("'Hearsay' is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted."). As the court of appeals observed, the tapes of the breakfast conversations were offered, not for the truth of the matters stated by Echols in his conversations recorded on those videotapes, but to demonstrate the familiar relationship between Echols and Councilmembers Arrington and Fowlkes and to provide a contextual backdrop for the nonverbal acts (Echols' payment of money to those Councilmembers) that were captured on videotape. The recorded conversations also demonstrated the ease with which the money changed hands, thus serving to corroborate Echols' testimony on direct examination that he routinely made such bribes to Fowlkes and Arrington.[5] See *United States* v. *Collicott*, 92 F.3d 973, 981

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[4] That was the ground upon which the government primarily relied in offering the tapes at trial. See Government's Response to The Paradies Defendants' Motion In Limine To Exclude Certain Testimonial, Video and Audio Evidence 7-11.

[5] Petitioners contend (Pet. 4) that, during the meetings, Echols twice stated that Paradies was behind Echols' agreement to pay Arrington $5,000 to secure the appointment of a certain individual to chair the City Council's Transportation Committee. That is a claim made for the first time in this Court. In his brief on appeal, Paradies asserted only that the recorded conversations contained statements by Echols about

n.7 (9th Cir. 1996) ("[I]f [prior consistent statements] become relevant for a purpose other than their truth, such as to clarify and provide context to other statements from the same conversation, then they may be admissible."); *United States* v. *Price*, 792 F.2d 994, 996-997 (11th Cir. 1986) (statements offered simply to

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Paradies' decision not to testify before the grand jury. See Paradies C.A. Br. 30 ("They wanted to talk to Paradies, and at that time Paradies' attorney wouldn't let Paradies go down."). In fact, the recorded conversations introduced by the government during its redirect examination of Echols did not contain the statements now complained of by petitioners. See GXs 473T and 475T (Echols' Feb. 3, 1993, meeting with Arrington, and Echols' Jan. 6, 1993, meeting with Fowlkes).

Following the introduction of the recorded conversations during the government's redirect examination of Echols (see Tr. 2221-2224, 2228, 2240-2245), defense counsel on recross-examination questioned Echols about a February 9, 1993, telephone conversation between Echols and Arrington that had not been introduced into evidence. Tr. 2253-2261. The defense was relying on a transcript of that recording that it had prepared for its own use; the government had not transcribed this conversation. See Tr. 2250-2252. On redirect examination, the district court allowed the government to introduce a tape of the conversation in question in order to place the conversation in context. Tr. 2272, 2275-2276. Because defense counsel did not have a clean copy of the transcript, it was not possible to provide the jury with copies of the transcript. See Tr. 2272, 2276. Even if the recording introduced into evidence contains the alleged incriminating statements, petitioners cannot complain of its admission. Petitioners broached the subject of the conversation during which the alleged statements were made, and therefore opened the door to admission of the tape of that conversation. Moreover, petitioners did not object when the tape was offered into evidence, see Tr. 2270, and did not request that the tape be redacted to excise the alleged incriminating statements. See Gov't C.A. Br. 132 n.22; Tr. 2275-2276.

put other statements into context are not hearsay); *United States* v. *Conn*, 769 F.2d 420, 422 (7th Cir. 1985) (upholding admission of tape recorded conversations as verbal acts to establish background, continuity, and the relationship between two public officials, and to explain subsequent taped conversations); *United States* v. *Valentine*, 644 F. Supp. 818, 821 (S.D.N.Y. 1986) ("When non-verbal conduct, like the transfer of money, is ambiguous, contemporaneous words which characterize the transactions are not hearsay."); see also 6 J. Wigmore, *Evidence* § 1777, at 275-276 (1976) ("Declarations accompanying a *delivery of money* may therefore be admissible, in order to determine whether a loan or a payment was made, whether one debt or another was paid, * * * or whether any other significance is to be attributed to the act.") (footnote omitted).[6] In sum, because the tapes were not hearsay, their admission was proper

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[6] See also *United States* v. *Romano*, 684 F.2d 1057, 1066 (2d Cir.) (in trial for extracting illegal labor payments as protection money, testimony by fish wholesalers that they were told the money would be used as "Christmas payments" for "the boys in the union" was admissible as utterances "contemporaneous with an independently admissible nonverbal act . . . and which relates to that act and throws some light upon it"), cert. denied, 459 U.S. 1016 (1982); *United States* v. *Jackson*, 588 F.2d 1046, 1050 n.4 (5th Cir. 1979) (upholding admission of directions given by an unidentified participant in a drug scheme to a "mule" because utterance is contemporaneous with an independently admissible nonverbal act and throws light upon it), cert. denied, 442 U.S. 941 (1979); *United States* v. *Annunziato*, 293 F.2d 373, 377 (2d Cir.) (similar), cert. denied, 368 U.S. 919 (1961).

despite the district court's erroneous reliance on Rule 801(d)(1)(B).[7]

Even if there were error in admitting the tapes, their admission was clearly harmless. The tapes in question were offered solely to corroborate Echols' detailed testimony on direct examination that he made regular breakfast payments to Arrington, Fowlkes, and other officials. Thus, the evidence was largely cumulative on the issue of those payments. Moreover, nothing that was said or done during the tapes implicated Paradies in the illegal payments; rather, his participation in the scheme was established entirely through other evidence. Gov't C.A. Br. 132-133.

3. In a motion to amend the petition for certiorari, filed within the period for filing a certiorari petition in this case, petitioner Paradies also challenges his conviction for conspiring to violate 18 U.S.C. 666, which prohibits corrupt payments to officials of state and local governmental agencies that receive $10,000 or more in federal financial assistance in a year. Paradies argues that Section 666 is limited in scope to corrupt payments that affect the integrity or the disbursement of federal funds. In *Salinas* v. *United States*, cert. granted, No. 96-738 (Feb. 24, 1997), one of

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[7] Petitioners argue (Pet. 24 & n.14) that, because the district court admitted the recorded statements pursuant to Rule 801(d)(1)(B), they had no occasion to request a limiting instruction concerning the use to which the statements could be put, and that they were prejudiced by the court's failure to give such an instruction. During closing argument, however, the government did not mention any of the recorded statements. Gov't C.A. Br. 128. Moreover, because the recorded statements were innocuous, there is no real possibility that petitioners were prejudiced by the lack of a limiting instruction.

the questions presented is whether Section 666 requires the government to prove that a payment to a public official would affect federal funds. If the Court grants petitioner Paradies leave to amend the certiorari petition to include that issue, then the petition should be held pending the decision in *Salinas*, and disposed of as appropriate in light of that decision.

CONCLUSION

The petition for a writ of certiorari should be denied as to the first two questions presented. On the question presented by the motion to amend the petition for a writ of certiorari, the petition should be held pending the decision in *Salinas* v. *United States*, No. 96-738, and then disposed of in accordance with that decision.

Respectfully submitted.

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APRIL 1997